

MATTER OF ANDRADE

In Deportation Proceedings

A-11351779

*Decided by Board April 5, 1974*

In the light of the Service adoption, on the recommendation of the Solicitor General, of the position that marijuana violators who are treated as youth offenders under state laws will be dealt with in the same manner as such offenders under Federal law, Service motion to terminate proceedings and withdraw the order directing respondent's deportation under section 241(a)(11) of the Immigration and Nationality Act, as amended, is granted since respondent's conviction of possession of marijuana in violation of section 11530 of the Health and Safety Code of California was subsequently expunged upon completion of youth offender treatment under section 1772 of the California Welfare and Institutions Code. [*Matter of Andrade*, Interim Decision No. 2205, superseded.]

CHARGE:

Order: Act of 1952—Section 241(a)(11) [8 U.S.C. 1251(a)(11)]—Any time have been convicted of a violation of any law or regulation relating to the illicit possession of marijuana.

ON BEHALF OF RESPONDENT:

Gary H. Manulkin, Esquire  
3609 North Mission Road  
Los Angeles, California 90031

ON BEHALF OF SERVICE:

Irving A. Appleman  
Appellate Trial Attorney

This case is before us on motion by the Immigration and Naturalization Service filed April 3, 1974, that we withdraw our prior order and terminate the proceedings. The motion will be granted.

In an amended order dated May 31, 1973, we dismissed respondent's appeal from an order of an immigration judge directing his deportation. While a minor, respondent had been convicted in the Superior Court of California of possession of marijuana in violation of section 11530 of the Health and Safety Code of California. Although that conviction had been subsequently expunged upon completion of youth offender treatment under section 1772 of the California Welfare and Institutions Code, we held that the expungement did not eliminate the conviction as a basis for deportation under section 241(a)(11) of the Immigration and Nationality

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Act, *Matter of Andrade*, Interim Decision 2205 (BIA 1973). Our decision was affirmed on judicial review, *Andrade-Gamiz v. INS* (C.A. 9, No. 73-2174, *Andrade-Gamiz v. INS*, 416 U.S. 965 (1974). Judgment vacated and case remanded with directions to dismiss the case as moot.

In the motion before us, the General Counsel informs us that, on the recommendation of the Solicitor General, the Service has now adopted the position that marijuana violators who are treated as youth offenders under state laws will be dealt with in the same manner as such offenders under federal law.<sup>1</sup> The latter are relieved from deportability on expungement of the conviction, *Mestre Morera v. INS*, 462 F.2d 1030 (C.A. 1, 1972); *Matter of Zingis*, Interim Decision 2270 (BIA, March 11, 1974).

As we have previously pointed out, the Service's determination not to institute or press deportation proceedings in a given case or class of cases is a matter of prosecutorial judgment which we do not review, *Matter of Geronimo*, 13 I. & N. Dec. 680 (1971). Where it would violate current policy to proceed, a criminal judgment may be set aside even though it has already been affirmed on appeal, *Petite v. United States*, 361 U.S. 529 (1960). The same considerations govern deportation proceedings, *Matter of Vizcarra-Delgado*, 13 I. & N. Dec. 51 (BIA 1968). We therefore see no reason why we may not withdraw our prior order and terminate the proceedings, notwithstanding the affirming judgment of the Court of Appeals in the interim.

The Service has asked us to expedite our ruling on its motion to meet a short deadline in the Solicitor General's office. Since the Service motion, if granted, will benefit the respondent, we may safely assume that there will not be opposition by his attorney. We therefore enter our decision on the motion without delaying to await receipt of a possible brief in opposition under 8 CFR 3.8(c).

**ORDER:** The Board's order dated May 31, 1973, as amended by its order dated August 13, 1973, and the immigration judge's order dated September 28, 1972 are vacated and the proceedings are terminated.

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<sup>1</sup> The reasons for the change in the Service position are spelled out in the General Counsel's motion, a copy of which is appended as well as in the appended copy of the Solicitor General's letter dated March 27, 1974.